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Supreme Court of the United States

OCTOBER TERM, 1935.

No. 650.

R. C. TWAY COAL COMPANY,
R. C. TWAY, President and Director of R. C. Tway Coal Company, and
L. A. SHAFER, Director of R. C. Tway Coal Company, - - - - - - - - - - Petitioners,

versus

C. H. CLARK.

BRIEF FOR PETITIONERS.

FOR PETITIONERS:

CHAS. I. DAWSON,
Kentucky Home Life Bldg.,
Louisville, Kentucky.

WOODWARD, DAWSON & HOBSON,
Kentucky Home Life Bldg.,
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A. SHELBY WINSTEAD,
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Of Counsel.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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v.

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BRIEF FOR PETITIONERS.

I.

OPINION OF COURT BELOW.

The opinion of the United States District Court for the Western District of Kentucky (R. 115-157), which is here under review, is reported in 12 Fed. Supp. 570.

II.

JURISDICTION.

The decree of the United States District Court for the Western District of Kentucky was entered

November 14, 1935 (R. 161-163). An appeal to the United States Circuit Court of Appeals for the Sixth Circuit was allowed November 22, 1935 (R. 169), and the transcript of the record was filed in that Court on December 19, 1935. On December 20, 1935, and before the case was heard or submitted in the Circuit Court of Appeals, a petition for a writ of certiorari was filed in this Court and on December 23, 1935, certiorari was granted, 296 U. S. XVI, as authorized by Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (Section 347, Title 28, U. S. C. A.).

The case involves the constitutionality of the Bituminous Coal Conservation Act of 1935 approved August 30, 1935 (Sec. 801, *et seq.*, Title 15, U. S. C. A.; 49 Stat. 991; Public No. 402, 74th Congress), the lower Court having held the Act constitutional in its entirety.

III.

BITUMINOUS COAL CONSERVATION ACT.

The Act which is copied in full in the appendix to this brief is entitled, "An Act to stabilize the bituminous coal mining industry and promote its interstate commerce; to provide for cooperative marketing of bituminous coal; to levy a tax on bituminous coal and provide for a drawback under certain conditions; to declare the production, distribution, and use of bituminous coal to be affected with a national public interest; to conserve the bituminous coal resources of the

United States; to provide for the general welfare, and for other purposes; and providing penalties."

Section 1 reads:

"That it is hereby recognized and declared that the mining of bituminous coal and its distribution by the producers thereof in and throughout the United States are affected with a national public interest; that the service of bituminous coal in relation to the industrial activities, the transportation facilities, the health and comfort of the people of the United States; the conservation of bituminous coal deposits in the United States by controlled production and economical mining and marketing; the maintenance of just and rational relations between the public, owners, producers, and employees; the right of the public to constant and ample supplies of coal at reasonable prices; and the general welfare of the Nation require that the bituminous coal industry be regulated as herein provided.

"It is further recognized and declared that all production of bituminous coal and distribution by the producers thereof bear upon and directly affect its interstate commerce and render regulation of all such production and distribution imperative for the protection of such commerce and the national public service of bituminous coal and the normal governmental revenues derivable from such industry; that the excessive facilities for the production of bituminous coal and the overexpansion of the industry have led to practices and methods of production, distribution, and marketing of such coal that waste such coal resources of the Nation, disorganize the interstate

commerce in such coal and portend the destruction of the industry itself, and burden and obstruct the interstate commerce in such coal, to the end that control of such production and regulation of the prices realized by the producers thereof are necessary to promote its interstate commerce, remove burdens and obstructions therefrom, and protect the national public interest therein; that practices prevailing in the production of bituminous coal directly affect its interstate commerce and require regulation for the protection of that commerce, and that the right of mine workers to organize and collectively bargain for wages, hours of labor, and conditions of employment should be guaranteed in order to prevent constant wage cutting and the establishment of disparate labor costs detrimental to fair competition in the interstate marketing of bituminous coal, and in order to avoid those obstructions to its interstate commerce that recur in the industrial disputes over labor relations at the mines."

Section 2 of the Act creates a National Bituminous Coal Commission which will hereinafter be referred to as the Commission, composed of five members appointed by the President, by and with the advice and consent of the Senate, for a term of four years, or until the prior termination of the Act, which by its terms expires four years after the date of its approval by the President.

Section 4 provides for the complete regulation of the bituminous coal industry through a working agreement to be known as the "Bituminous Coal Code," to

be formulated by the Commission as therein directed. That section sets out, in great detail, the matters to be dealt with in the Code.

By its terms the entire bituminous coal producing area of the United States is divided into nine minimum price areas and still further divided into twenty-three producing districts, each of such minimum price areas embracing one or more producing districts as specifically set out.

It is provided by Section 4 that the code established in accordance with its terms shall be administered and enforced by the Commission, as to all matters other than labor relations between the producers and their employees, through district boards selected by each of the twenty-three districts in the manner therein provided, and as to such labor relations, by the Commission through a Bituminous Coal Labor Board consisting of three members appointed by the President of the United States by and with the advice and consent of the Senate.

The regulations provided for by Section 4 are directed at each of the two distinct phases of the business of bituminous coal producers, one the producing end of the business, and the other the selling end thereof. The regulations dealing with the strictly producing end of the business are found in Part III of Section 4 under the heading, "Labor Relations." It is therein provided:

1. That employees shall have the right to organize and bargain collectively with their employer, through

representatives of their own choosing, free from the interference, restraint or coercion of their employer in the designation of such representatives or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

2. That no employee and no one seeking employment shall be required, as a condition of employment, to join any company union.

3. That employees shall have the right to select their own check-weighman to inspect the weighing or measuring of coal.

4. That employees shall not be required, as a condition of employment, to live in company houses or to trade at the store of their employer.

5. That whenever maximum daily and weekly hours of labor are agreed upon in any contract or contracts negotiated between the producers of more than two-thirds of the annual national tonnage produced for the preceding calendar year and representatives of the majority of the mine workers employed, such maximum hours of labor shall be binding upon all code members.

6. That if wage agreements are negotiated by collective bargaining in any district or group of two or more districts, between representatives of producers of more than two-thirds of the annual tonnage produced in such district, or in each of such districts in a contracting group, during the preceding calendar year, and representatives of the majority of the mine workers therein, the code members operating in such dis-

trict or group of districts shall accept as the minimum wages for the various classifications of labor employed by them the wages so agreed upon.

7. That the Bituminous Coal Labor Board, provided for in Section 4 of the Act, shall have authority to adjudicate disputes arising between code members and their employees concerning all matters of labor relations dealt with in Part III of Section 4.

All code members are required to accept each of the foregoing conditions.

The provisions dealing with the selling end of the business, required by Section 4 to be incorporated in the code, are found in Part II of Section 4 under the heading "Marketing," and may be summarized as follows:

1. The fixing of minimum prices at which coal may be sold by code members, such prices to be determined according to the formula attempted to be set up in the Act.

2. The fixing of maximum prices when in the judgment of the Commission it is necessary so to do in the public interest.

3. The regulation of contracts and trade practices in the sale of coal by code members for the purpose of making effective the prices fixed by the Commission.

4. The defining and outlawing of unfair methods of competition.

All code members are required to accept each of these provisions.

Ostensibly, producers are left free to accept the

code and operate under its provisions or to refuse to do so, but as a practical matter a producer who desires to continue in business has no choice but to accept the provisions of the code and to operate thereunder.

Section 3 provides:

> "There is hereby imposed upon the sale or other disposal of all bituminous coal produced within the United States an excise tax of 15 per centum on the sale price at the mine, or in the case of captive coal the fair market value of such coal at the mine, such tax, subject to the later provisions of this section, to be payable to the United States by the producers of such coal, and to be payable monthly for each calendar month, on or before the first business day of the second succeeding month, and under such regulations, and in such manner, as shall be prescribed by the Commissioner of Internal Revenue: *Provided,* That in the case of captive coal produced as aforesaid, the Commissioner of Internal Revenue shall fix a price therefor at the current market price for the comparable kind, quality, and size of coals in the locality where the same is produced: *Provided further,* That any such coal producer who has filed with the National Bituminous Coal Commission his acceptance of the code provided for in section 4 of this Act, and who acts in compliance with the provisions of such code, shall be entitled to a drawback in the form of a credit upon the amount of such tax payable hereunder, equivalent to 90 per centum of the amount of such tax, to be allowed and deducted therefrom at the time settlement therefor is required, in such manner as shall be prescribed by the Commissioner of In-

ternal Revenue. Such right or benefit of drawback shall apply to all coal sold or disposed of from and after the day of the producer's filing with the Commission his acceptance of said code in such form of agreement as the Commission may prescribe. No producer shall by reason of his acceptance of the code provided for in section 4 or of the drawback of taxes provided in section 3 of this Act be held to be precluded or estopped from contesting the constitutionality of any provision of said code, or its validity as applicable to such producers."

Section 5 provides that the acceptance of the Code by producers shall be on forms provided by the Commission, such acceptances to be acknowledged before some official authorized to take acknowledgments. That section also provides that the membership of any coal producer in the Code, and his right to a drawback on the taxes levied under Section 3 may be revoked by the Commission in the manner therein provided for, upon proof that such member has wilfully failed or refused to observe the provisions of the Code.

Section 6 makes provision for a court review of the orders of the Commission and of the Labor Board, but upon such review the findings of the Commission or the Labor Board, as to facts, if supported by substantial evidence, are made conclusive.

Section 9 provides that those producers who refuse to accept and maintain membership in the Code shall not only be liable for the entire tax imposed by Sec-

tion 3, but shall also be subject to other Acts of Congress regulating industries and their labor relations or providing for codes of fair competition therein.

Subsection (e) of Part II of Section 4, in connection with Section 12, outlaws contracts for the sale of coal made prior to the effective date of the Act if the prices fixed in those contracts are below the minimum prices enumerated in those provisions of the Act.

Section 14 still further penalizes non-code-member producers by denying to them the right to sell coal to the United States or to any agency thereof, or to any contractor for use in carrying out any contract with the United States or with any agency thereof.

Section 15 provides:

> "If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby."

Section 20 provides that Section 3 shall become effective on the first day of the third calendar month after the enactment of the Act or as soon thereafter as the Commission shall have formulated the Code and forms of acceptance for membership therein.

IV.

STATEMENT OF THE CASE.

Pleadings.

The respondent, C. H. Clark, a stockholder and director of R. C. Tway Coal Company filed his bill in equity (R. 1-7) to compel the petitioners, R. C. Tway Coal Company, R. C. Tway, as President and Director of R. C. Tway Coal Company, and L. A. Shafer as Director of R. C. Tway Coal Company, to accept and operate under the Code provided for by Section 4 of the Act.

The bill alleges that R. C. Tway Coal Company is a Kentucky corporation engaged in the mining and producing of bituminous coal from its mines located in Harlan County Kentucky and in selling the coal so produced; that under its charter its affairs are conducted by a board of three directors elected annually by the stockholders, and that the present Board is composed of the respondent, Clark, and the petitioners, R. C. Tway and L. A. Shafer, Tway also being President of the Company; that prior to September 10, 1935 the majority of the Board of Directors reached the conclusion that the Bituminous Coal Conservation Act of 1935 was unconstitutional and determined that the Company would not accept the provisions of the Code required to be formulated under Section 4 of the Act; that the respondent, Clark, as a director and stockholder, believing that this action of the Board

was founded upon an incorrect view of the law, and if persisted in would subject the Company to the payment of the 15 per cent tax provided for by the Act, made a written demand upon the Board (R. 4) to reconsider its action, and upon such reconsideration to elect to accept the Code provided for in the Act and to operate under its provisions.

Appropriate allegations were made showing that the matter was not only reconsidered by the Board, but was also considered by the stockholders at a special meeting called for that purpose, and that the majority of the Board adhered to their original decision not to accept the Code and not to operate under its provisions (R. 5), for the specific reason that the Bituminous Coal Conservation Act of 1935 is unconstitutional and that to accept the Code and to operate under the terms required by Section 4 to be incorporated therein would amount to an abrogation and surrender of the right of the Board of Directors to conduct the business of the Company free from unconstitutional interference on the part of the National Government, and that to accept the Code and operate thereunder would be detrimental to the interest of the Company; that the majority of the stockholders approved and endorsed the decision of the majority of the Board of Directors (R. 5-6). The respondent, Clark, voted in opposition to the action of the majority of the Board and to the action of the majority of the stockholders.

The bill alleges that the Act is constitutional; that the matters required by Section 4 to be embraced in

the Code therein provided for, are matters within the competency of Congress and that that body, under the Constitution, has the power to impose the tax, which is imposed by Section 3 of the Act, upon those producers who refuse to accept the Code and to operate under its provisions; that the profit realized by the Coal Company for many years has not been, is not now, and will not in the future be in excess of 5 per cent of the sale price of the coal mined and sold by it, and that the tax of 15 per cent can only be paid out of the capital assets of the Corporation; that in view of these facts the refusal of the Company to accept the Code and to operate under it is an abuse of its corporate functions, and that the refusal of the majority of the Board of Directors to cause the Company to accept the Code and to operate under its provisions is an abuse of their power to conduct the affairs of the Corporation, and that such refusal will work irreparable damage and injury upon the Corporation and upon its shareholders.

The petitioners filed a motion to dismiss the bill (R. 8-9), in which they specifically admitted the right of the respondent to the relief sought, if the Act is constitutional, but they contended that the respondent was not entitled to the relief sought because the Act is unconstitutional for the following reasons:

1. Because Congress, under the Constitution of the United States, has no jurisdiction over and no power to legislate concerning the matters required by Section 4 to be embraced in the Bituminous Coal Code

therein required to be formulated, and the attempted regulation by Congress of those matters is violative of the due process clause of the Fifth Amendment to the Constitution of the United States, and of the rights reserved to the states and to the people by the Tenth Amendment.

2. Because Sections 3 and 9, insofar as they purport to impose upon those producers of bituminous coal, who refuse to accept and operate under the Code formulated under the provisions of Section 4, a tax equal to 15 per cent of the sale price at the mine of the coal produced by them, is not a good faith exercise of the taxing power conferred upon Congress by the Constitution, but is an unconstitutional attempt on the part of Congress, under the guise of taxation, to coerce all producers of bituminous coal into accepting and operating under the Code provided for by Section 4 and to punish those producers who are unwilling to surrender their constitutional right to conduct their business free of unconstitutional interference and regulation by Congress; that the imposition of such penalty deprives producers who refuse to accept the provisions of the Code of their property without due process of law in violation of the Fifth Amendment, and is an unconstitutional invasion of the rights reserved to them by the Tenth Amendment.

3. Because Section 4 improperly delegates legislative power to the National Bituminous Coal Commission and to the other agencies created by the Act.

4. Because the tax attempted to be imposed upon those producers who refuse to accept and operate

under the Code is arbitrary, capricious and confiscatory and was deliberately intended by Congress to be confiscatory.

Evidence.

The parties stipulated of record (R. 11-13, 17-18) the following facts:

That all the bituminous coal produced in the United States, amounting to approximately 330 million tons annually is, with the exception of an immaterial amount consigned to prepay stations, sold f. o. b. railroad cars at the mine of the producing company; that approximately 14 per cent of the total annual production is sold to customers living in the state in which the coal is produced and the remainder to customers living in other states; that the R. C. Tway Coal Company sells approximately 25 per cent of its production to customers in the State of Kentucky and the remainder thereof to customers living in other states; that the greatest competitors of the Harlan coal field, in which the R. C. Tway Coal Company's mine is located, are mines located in the states of Ohio, West Virginia and Pennsylvania; that approximately 4 per cent of all the bituminous coal produced in Kentucky is sold to customers in that state; that approximately 44 per cent of all bituminous coal produced in Ohio is sold to customers residing in that state, excluding coal sold and delivered to railroads for fuel in that state, and approximately 18 per cent of such production is sold and delivered to such railroads; that exclu-

sive of the coal sold and delivered in that state to railroads for fuel, approximately 38 per cent of all the bituminous coal produced in the State of Pennsylvania, is sold to customers residing in that state and approximately 12 per cent is sold to railroads in the state for fuel; that excluding coal sold and delivered in that state to railroads for fuel, approximately 4 per cent of the total production of bituminous coal in the State of West Virginia is sold to customers residing in that state, and approximately 7 per cent thereof is sold and delivered to railroads in that state for fuel; that the average annual production of bituminous coal in Kentucky is approximately 35 million tons, in Ohio 18 million tons, in Pennsylvania 80 million tons and in West Virginia 90 million tons; that the R. C. Tway Coal Company ordinarily employs in its mine about 300 men whose duties are exclusively concerned with the mining of coal and that only six of its employees have anything to do with the selling end of the Company's business and that these facts are typical of other bituminous coal mines, including those in the Harlan coal field; that the average total sales per month of the R. C. Tway Coal Company amount to approximately $44,000.00 and that the 15 per cent monthly tax thereon would amount to $6,600.00, whereas, the profits realized by the Company on such sales do not and will not exceed 5 per cent thereof, and such profit is as great as the profit realized by bituminous coal producers generally, including those in the Harlan field; that approximately 450,000 men are now employed in the mining of bituminous coal in

the United States and over 60 per cent of the cost of producing such coal is attributable to the cost of labor; that the potential productive capacity of the developed bituminous coal mines of the United States is in excess of the normal demand for such coal; that bituminous coal is used in generating energy for the production of light, heat and power in all parts of the United States, and substantially 45 per cent of the total energy consumed for such purposes in the United States is produced from the use of bituminous coal; that the transportation of bituminous coal supplies nearly 18 per cent of the total gross freight revenues of the interstate railroads of the country and substantially 20 per cent of the total annual production of bituminous coal in the United States is required for the use of such interstate railroads as fuel.

It was further proven (R. 112) that according to the figures of the United States Geological Survey, and based upon production for the year 1929, it would take more than 2,800 years to exhaust the available supply of bituminous coal in the United States.

The Department of Justice, through the United States Attorney for the Western District of Kentucky, was invited by counsel for the respondent to appear in the case and assist in sustaining the constitutionality of the Act (R. 15-16) and both sides invited the District Attorney to prepare and present any statement of facts he conceived to be pertinent to the issues in the case and agreed that if such facts were true and material, such statement could be filed as evidence to be considered by the Court in the decision of the case

(R. 18). The representatives of the Department of Justice declined to avail themselves of the invitations, but did appear and file a brief as *amicus curiae,* questioning the good faith of the action and also contending that it was premature (R. 16, 17).

While this case was pending in the lower Court there was also pending in the same Court a suit filed by R. C. Tway Coal Company and eighteen other coal companies against Selden R. Glenn, Collector, in which they attacked the constitutionality of the same Act. In that case the Collector was represented by the United States Attorney for the Western District of Kentucky, and representatives of the Department of Justice, and it was heard at the same time as the case at bar, and is now in this Court as No. 649, October Term, 1935, under the style of R. C. Tway Coal Company, *et al.,* Petitioners, v. Selden R. Glenn, etc., Respondent, and is set for argument in this Court on the same day as the case at bar. By agreement respondent offered in his behalf, subject to objections to relevancy and materiality, the evidence presented in behalf of the Collector in the other case (R. 19-112). This evidence in large part consisted of an extended review of the economic history of the coal industry, its importance to the Nation and its alleged direct relationship to and effect upon interstate commerce and the general welfare. The Court sustained an objection to this testimony, but permitted it to remain in the record as an avowal (R. 114). In his opinion, however, he took judicial notice of substantially all the matters dealt with in that evidence.

Ruling of the District Court.

The Court found the facts (R. 158) to be as alleged in the bill and as stipulated. As a matter of law it was held (R. 161) that the action was not a collusive one nor premature, and that the Court had jurisdiction of the controversy. It was further held that the Act is a constitutional exercise of the power of Congress to regulate interstate commerce and does not violate either the Fifth or Tenth Amendment nor does it improperly delegate legislative power; that Sections 3 and 9, to the extent that they levy a monthly exaction, equal to 13½ per cent of the sale price at the mine of the coal sold by them, upon those producers who do not accept the Code provided for in the Act and exempt therefrom those producers who accept the Code, are not revenue provisions but represent a valid exercise of the power of Congress to impose penalties for the purpose of coercing compliance with the regulations of the Act dealing with interstate commerce, and therefore do not deprive the Coal Company of its property without due process of law in violation of the Fifth Amendment, nor do they invade the rights reserved to the States and to the people under the Tenth Amendment. It was further held that in view of the constitutionality of the Act, the continued refusal of the R. C. Tway Coal Company to accept the Code and to operate under its provisions would be a perversion of its corporate functions and destructive of the Company's business and assets and of the in-

terests of its stockholders, and that, therefore, it should accept and operate under the Code. A decree was entered accordingly. So much of the decree, however, as required the Company to accept and comply with the Code was suspended pending final determination of the case on appeal.

V.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

The errors assigned (R. 166) are either directed to the rulings of the Court holding the Act constitutional or to rulings flowing from such holdings, and therefore on this hearing we shall rely on only those assigned errors directed to the holdings of the Court on the constitutionality of the Act.

VI.

ARGUMENT.

The constitutional questions involved in this case are identical with those involved in the companion case of R. C. Tway Coal Company, *et al.*, v. Selden R. Glenn, etc., No. 649, October Term, 1935, which is set for argument with this case. The petitioners in that case are making the same contention as to the unconstitutionality of the Act as are the petitioners in this case, the R. C. Tway Coal Company being one of the petitioners in each case. The constitutionality of the Act has been fully briefed by the petitioners in No. 649

and to avoid repetition and the imposition of unnecessary labor upon the Court we respectfully ask that the argument of petitioners in No. 649 on the unconstitutionality of the Act be treated by the Court as the argument of petitioners in this case on that subject. A copy of petitioners' brief in No. 649 has been served upon counsel for respondent in this case and we are authorized to say for him that the foregoing suggestion is satisfactory to him.

Respectfully submitted,

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